STATE OF MICHIGAN
IN THE SUPREME COURT
(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

LACY HARTER and MIKE McCLELLAND
as Co-Personal Representatives of the
Estate of KEGAN McCLELLAND, Deceased,
and LACY HARTER, Individually and
MIKE McCLELLAND, Individually,

Plaintiffs-Appellees,

Supreme Court Docket No. 126255
Court of Appeals No. 244689

vs.

GRAND AERIE FRATERNAL ORDER OF EAGLES,

Livingston Circuit Court
No. 00-017892-NO

Defendant-Appellant,

and

HOWELL AERIE #3607 FRATERNAL ORDER OF EAGLES,

Defendant-Appellee,

and

MICHIGAN STATE AERIE FRATERNAL ORDER OF EAGLES,
HARRIS SPECTIC CLEANING AND ALWAYS CLEAN
PORTABLE TOILETS, INC., DALE HARRIS, Individually,
and AMERICAN CONCRETE PRODUCTS, INC., Individually,

Defendants Not Participating.

AMICUS CURIAE BRIEF OF THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS AND MOOSE INTERNATIONAL, INC.

PROOF OF SERVICE

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STATEMENT OF INTEREST

Amicus Curiae, BENEVOLENT AND PROTECTIVE ORDER OF ELKS (Elks) and MOOSE INTERNATIONAL, INC., are non-profits national fraternal organizations with similar structures and relationships with local chapters as Defendant-Appellant Grand Aerie maintains with its Local Aeries. Thus, both the Elks and Moose have great interest in ensuring that vicarious and direct liability is not imposed on national fraternal organizations for the torts of their local chapters. The Amicus Curiae brief will address the attempts of Plaintiffs-Appellees to seek liability against the Grand Aerie on agency theory, negligent supervision, and premises liability. Moreover, the Elks and Moose have a similar interest in a ruling by this Court that would preclude or greatly limit the ability of a plaintiff and one defendant to enter into an agreement that severely prejudices the ability of the remaining defendant(s) to defend its case. The Amicus Curiae brief will speak to the wisdom of curtailing this practice.

STATEMENT OF APPELLATE JURISDICTION

Defendant-Appellant Grand Aerie has brought this case before this Court on an Application for Leave to Appeal seeking to reverse the unpublished per curiam opinion of the Michigan Court of Appeals in Harter v. Grand Aerie Fraternal Order of Eagles, Docket No. 244689, April 22, 2004. Amicus Curiae Elks and Moose have filed this brief to join in Defendant-Appellant's request that this Court grant its Application for Leave to Appeal.

STATEMENT OF QUESTIONS PRESENTED

I. **SHOULD THE GRAND AERIE BE HELD VICARIOUSLY OR DIRECTLY LIABLE FOR THE ALLEGED TORTS COMMITTED BY MEMBERS OF ITS LOCAL AERIE WHEN THE GRAND AERIE HAD NO CONTROL OVER THE DAY-TO-DAY OPERATIONS OF THE LOCAL AERIE OR THE PREMISES ON WHICH THE INJURY OCCURRED?**

Defendant-Appellant answers: "No."

Plaintiffs-Appellees answer: "Yes."

Amicus Curiae Elks and Moose answer: "No."

II. **SHOULD THE COURT OVERTURN THE VERDICT AGAINST THE GRAND AERIE BECAUSE IT WAS A DIRECT RESULT OF AN UNETHICAL AND IMPROPER MARY CARTER AGREEMENT BETWEEN PLAINTIFFS-APPELLEES AND THE LOCAL AERIE THAT DENIED THE GRAND AERIE A FAIR TRIAL?**

Defendant-Appellant answers: "Yes."

Plaintiffs-Appellees answer: "No."

Amicus Curiae Elks and Moose answer: "Yes."

STATEMENT OF FACTS

Amicus Curiae Benevolent and Protective Order of Elks and Moose International, Inc., hereby adopt the statement of facts and proceedings as set forth in Defendant-Appellant Grand Aerie's Brief in Support to its Application for Leave to Appeal.

ARGUMENT

I. THE GRAND AERIE IS NEITHER INDIRECTLY NOR DIRECTLY LIABLE FOR TORTS OF THE MEMBERS OF ITS LOCAL AERIE WHEN THERE IS NO AGENCY RELATIONSHIP, THE GRAND AERIE MAINTAINED NO CONTROL OVER DAY-TO-DAY BUSINESS OF THE LOCAL CHAPTER, THE GRAND AERIE HAD NO DUTY TO SUPERVISE THE LOCAL CHAPTER, AND THE GRAND AERIE DID NOT POSSESS OR CONTROL THE PREMISES ON WHICH THE INJURY OCCURRED.

Appellate Courts review a grant or denial of both a motion for summary disposition and a motion for judgment notwithstanding the verdict *de novo*. Maiden v. Rozwood, 461 Mich. 109, 118; 597 N.W.2d 817 (1999); Meagher v. Wayne State University, 222 Mich. App. 700; 565 N.W.2d 401 (1997). An examination of the proofs submitted during the course of this action demonstrate that Defendant-Appellant Grand Aerie Fraternal Order of Eagles was improperly denied summary disposition and judgment not withstanding the verdict because it had no vicarious or direct liability for the alleged negligence of members of its local chapter. Specifically, this Court should reverse the decision of the Court of Appeals and the Trial Court because Plaintiffs-Appellees are unable to prove, as a matter of law, that agency theory rendered the Grand Aerie vicariously liable, that the Grand Aerie negligently supervised maintenance of the premises of the Local Aerie, that the Grand Aerie was negligent under a premises liability theory, or that policy considerations justify the imposition of indirect or direct liability against a national fraternal organization that retains no control over the day-to-day activities or the premises of its local chapters.

a. No vicarious liability should flow from the alleged negligence of the Local Aerie to the Grand Aerie because there is no evidence of an agency relationship between these parties.

The burden of proving an agency relationship rests with the party alleging the existence of such a relationship. Northern Concrete Pipe, Inc., v. Phoenix Sprinkler & Heating Co., 16

Mich. App. 650; 168 N.W.2d 446 (1969). When the purported agency is created by an unambiguous written document, the finding of an agency is a question of law. Keiswetter v. Rubenstein, 235 Mich. 36, 42-43; 209 N.W. 154 (1926). Cases holding that the determination of agency is a factual question[1] are not controlling because they were decided before this Court's clarification of the standard for summary disposition. Maiden v. Rozwood, 461 Mich. 109, 118; 597 N.W.2d 817 (1999); Simmons v. Sunoco, Inc., 2004 Mich. App. LEXIS 1162 (Unpublished) (Exhibit R)[2].

The evidence before the Trial and Appellate Courts conclusively demonstrated that there is no genuine issue of material fact that agency theory precludes any finding of vicarious liability on the part of the Grand Aerie for the alleged torts committed by members of the Local Aerie. Because Plaintiffs-Appellees cannot prove that the Grand Aerie retained sufficient control over the Local Aerie to show apparent authority, that an agency relationship was created through estoppel (ostensible agency), or vicarious liability flows from implicit authority, the decisions of the lower courts should be reversed.

1. The Grand Aerie did not maintain control over the day to day activities of the Local Aerie so as to create an apparent agency relationship between the two organizations.

Apparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent. Smith v. Saginaw Savings & Loan Ass'n., 94 Mich. App. 263, 271; 288 N.W.2d 613 (1979). Courts must examine all of the surrounding circumstances to determine whether an agent possesses apparent authority to perform a particular act. Id. The

[1] Green v. Shell Oil Co., 181 Mich. App. 439; 450 N.W.2d 50 (1989); Clark v. Texaco, 55 Mich. App. 100; 222 N.W.2d 52 (1974); and Johnston v. American Oil Co., 51 Mich. App. 646; 215 N.W.2d 719 (1974).
[2] Exhibits, unless noted otherwise, are in reference to the exhibits included in Defendant-Appellant's Brief in Support of its Application for Leave to Appeal.

plaintiff's impression or characterization of the relationship is not controlling. Goodspeed v. MacNaughton, Greenawalt & Co., 288 Mich. 1, 7-8; 284 N.W. 621 (1939).

The existence of an agency relationship is predicated on whether a principal has a right to control the acts of the agent. Maretta v. Peach, 195 Mich. App. 695, 697; 491 N.W.2d 278 (1992). To impose vicarious liability where the alleged agent and principal are separate entities, it must be shown that the principal had control and direction over the day to day operations of the agent. Little v. Howard Johnson Company, 183 Mich. App. 675, 681-682; 455 N.W.2d 390 (1990). Even if the alleged principal retains authority to inspect and check the premises, it does not amount to control or direction over the agent's day to day operations. Id. at 682.

Little provides a similar set of circumstances to the case at hand, although the nature of the relationship in that case was one of franchisor/franchisee. In Little, the plaintiff was injured when she fell on a sidewalk that she alleged had not been properly de-iced. Id. at 677. She sued the franchisor alleging premises liability, vicarious liability, and ostensible agency. In ruling that the franchisor had no vicarious liability for the negligent maintenance of the franchisee's premises, the Court of Appeals determined that the franchisor did not retain sufficient control of the franchisee to indicate an agency relationship. Specifically, the Little Court related the question of vicarious liability under agency theory to that of liability for the torts of an independent contractor. Consequently, the Court of Appeals examined the "defendant's control of the franchisee in terms of defendant's right to take part in the day-to-day operation of the franchisee's business." Id. at 682. The Court's analysis is applicable to the case at hand:

> The franchise agreement in this case primarily insured the uniformity and the standardization of products and services offered by a Howard Johnson restaurant. These obligations do not affect the control of daily operations. Furthermore, while defendant retained the right to regulate such matters as building construction, furnishings and equipment, and advertising, it retained no power to control the details of the restaurant's day-to-day operations. Defendant had no

> control over hiring and firing or supervision of employees. Defendant retained no control over the daily maintenance of the premises other than to obligate the franchisee to maintain such in a "clean" and "orderly" condition. Again, the methods and details of maintenance were controlled by the franchisee. Although defendant had the right to conduct inspections, defendant's actual control was limited to the right to hold the franchisee in breach of the franchise agreement for any deviation. We conclude that plaintiff did not present a triable issue concerning defendant's right to control the day-to-day operations of the franchisee. Id. (citations omitted)

Contrary to Plaintiffs-Appellees' assertion, Van Pelt v. Paull, 6 Mich App 618; 150 N.W.2d 185 (1967), cannot be read to create a question of fact as to an agency relationship between a national fraternal organization and its local chapters. As the Little Court points out, the franchisor defendant in Van Pelt retained a significant amount of control over the franchisee's daily business operations. Little, 183 Mich. App. at 680. For example, the franchisor in Van Pelt counter-signed the franchisee's checks, the business was conducted on land owned or leased by the franchisor, and the franchisor restricted the amount of money the franchisee could extract from the business's account. Van Pelt, 6 Mich. App. at 621-622. Such a level of control greatly exceeds that of a national fraternal organization over its local chapters.

No Michigan case law establishes an agency relationship between a national fraternal organization and its local chapters. As Judge O'Connell correctly notes in his dissent to this case in the Court of Appeals, Kaminski v. Great Camp Knights of the Modern Maccabees, 146 Mich. 16; 109 N.W. 33 (1906), mandates that a national fraternal organization is not vicariously liable, under an agency theory, for the torts of the members of its local chapters. In Kaminski, the plaintiff was injured during an initiation ceremony into a subordinate "tent" of the national fraternal organization. The plaintiff brought an action against the national organization based on a principal/agent relationship between the nation order and the "degree team of Belle Isle Tent." He alleged that agency was established because the members were required to follow certain

initiation rituals prescribed by the national organization. The Court, however, determined that the local "tent" members were not agents of the national organization when they acted to injure the plaintiff.

The idea that vicarious liability only flows to a principal when day to day control is established over a subordinate is embodied in Comment "a" to 1 Restatement 2d, Agency § 250:

> A principal employing another to achieve a result but not controlling or having the right to control the details of his physical movements is not responsible for incidental negligence while such person is conducting the authorized transaction. Thus, the principal is not liable for the negligent physical conduct of an attorney, a broker, a factor, or a rental agent, as such. In their movements and their control of physical forces, they are in relation of independent contractors to the principal. It is only when to the relation of principal and agent there is added that right to control physical details as to the manner of performance which is characteristic of the relation of master and servant that the person in whose service the act is done becomes subject to liability for the physical conduct of the actor. . . .

A Louisiana Appellate Court has applied this Comment to the relationship between a national college fraternal organization and the members of a local chapter. Morrison v. Kappa Alpha Psi Fraternity, 738 So.2d 1105, 1120 (La. App. 2 Cir. 1999), specifically found that a national fraternal organization is not vicariously liable for the torts of a member of a local chapter during a hazing incident. "Only when the relationship of the parties includes the principal's right to control physical details of the actor as to the manner of his performance, which is characteristic of the relation of master and servant, does the person in whose service the act is done become subject to liability for the physical tortuous conduct of the actor." Id. The Court found that the national organization was not vicariously liable because there was "no evidence that the national fraternity exercised any control over the physical ***details*** of Magee's acts of hazing, assaulting and battering Kendrick during a secret, unscheduled, unsanctioned meeting in Magee's dorm room." Id. (emphasis added)

As Defendant-Appellant notes in its Application for leave to Appeal, several other jurisdictions have specifically refused to impose vicarious liability on national fraternal organizations for the torts of their local chapters.[3] Plaintiffs-Appellees, on the other hand, merely cite a few foreign cases that, upon examination, do nothing to support their position on vicarious liability. Ballou v. Sigma Nu General Fraternity, 291 SC 140; 352 S.E.2d 488 (1986), for example, is readily distinguishable from all of the above cited cases because the national fraternal organization *conceded* agency. Thus, the Ballou Court failed even to examine the question of whether the local chapter acted as an agent of the national organization. Id. Likewise, Fraternal Order of Eagles Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 59 P.3d 655 (Wash. 2002), also does not address the agency question. Rather, this case involves the policies of admission into the organization under a Washington anti-discrimination statute. Id.

The Michigan Legislature also has expressed an intent to confer autonomy on local fraternal chapters. MCL 457.1 et seq. provides rules governing the establishment and administration of certain fraternal associations. MCL 457.303, for example, provides that the local chapters of the Benevolent and Protective order of Elks;

> shall have full power to make and establish rules, regulations and bylaws, for regulating and governing all the affairs and business of the corporation not repugnant to, or inconsistent with the constitution, rules, and edicts of the grand lodge of the order, or the constitution and laws of this state, or of the United States, and to elect and appoint from its members officers under a name and style as shall be in accordance with the constitution of the grand lodge of the order.

[3] Morgan v. Veterans of Foreign Wars of the United States, 565 N.E.2d 73 (Ill. App. 1991); Bank of Waukegan v. Epilepsy Foundation of America, 516 N.E.2d 1137 (Ill. 1987); Stein v. Beta Rho Alumni Association, Inc., 621 P.2d 632 (Ore. 1980); Daniels v. Reel, 515 S.E.2d 22 (N.C. 1999); Alessi v. Boy Scouts of America, 668 N.Y.S.2d 838 (1998); Young v. Boy Scouts of America, 51 P.2d 191 (Cal. App. 1935) and Carneyhan v. Grand Aerie Fraternal Order of Eagles, 2003 WL 253192 (Ken. App. 2003)(Holding of no agency with same Defendant as in this action after an examination of the Constitution and Statutes of the Grand Aerie.).

Similar provisions pertaining to other fraternal associations within Chapter 457 indicate the intent of the Legislature to emphasize the autonomy of local chapters in matters not specifically reserved by the state or national organization.

In the matter before this Court, no vicarious liability should flow from the Local Aerie to the Grand Aerie because the latter organization exercised no control over the day to day operations of the former entity. It is not disputed that these entities are separate corporations. While the Grand Aerie does provide a general Constitution and Statutes, these documents are meant to ensure the ceremonies and traditions of the Order are preserved but they reserve a very large degree of autonomy for the local chapters. (Exhibit H) Specifically, the Statutes provide that "[t]he operation of a licensed or unlicensed Local Aerie is not subject to Grand Aerie supervision and control, except as provided in Section 39.4. Id. at Sec. 89.10. Section 39.4 merely provides for the appointment of an agent to serve in place of local trustees and or officers in the event that the charter of a Local Aerie is suspended. Furthermore, "[e]ach Local Aerie shall have general jurisdiction over its members, and such other power and authority as may be incident to conducting the business of the Local Aerie, not in conflict with the Laws of the Order." Id. at Article VII, Sec. 6. Nothing in these documents or the acts of the Grand Aerie indicate an attempt to control the day to day activities, including maintenance or social gatherings, of the Local Aerie. Likewise, there is no evidence that the Grand Aerie endeavored to exert control over these events despite its lack of authority to do so under the Constitution and Statutes.

Moreover, the Grand Aerie had no knowledge of either the septic system maintenance or the "Family Fun Day." Nor was the Local Aerie, under the Statutes of the national organization or the course of dealing between the Grand and Local Aeries, required to inform the Grand Aerie

or seek its approval for these activities. (Exhibit H; Exhibit B, p. 94; Exhibit C, pp. 58, 60) In fact, the Statutes of the Grand Aerie provides that the local "House Rules and By-Laws of the Local Aerie are the exclusive governing authority" for the conduct of social events. (Exhibit H, Sec. 89.10)

Plaintiffs-Appellee's attempt to counter these facts with the affidavit of Plaintiff Lacy Harter does not create a genuine issue of material fact. MCR 2.119(B)(1)(c) requires that an affidavit submitted in response to a motion must show that the affiant is able to competently testify to the facts asserted in the affidavit. Moreover, speculation and conjecture are not sufficient to establish a genuine issue of material fact. Detroit v. GMC, 233 Mich. App. 132, 139; 592 N.W.2d 732 (1998). Without any evidence of actual control, the intent to control, or notice of the maintenance decisions or the social gatherings of the Local Aerie, the Grand Aerie cannot be held vicariously liable for the alleged torts of members of it local chapter.

2. Plaintiffs-Appellees presented no evidence that would indicate an agency by estoppel (ostensible agency) between the Grand and Local Aerie.

Nor is a local chapter an ostensible agent of the national organization. To recover against a principal for the acts of its ostensible agent, a plaintiff must prove that "[First] The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; [second] such belief must be generated by some act or neglect of the principal sought to be charged; [third] and the third person relying on the agent's apparent authority must not be guilty of negligence." Grewe v. Mt. Clemens General Hospital, 404 Mich. 240, 253; 273 N.W.2d 429 (1978). The ostensible agency claim of Plaintiffs-Appellees fails because they cannot prove the first two elements.

Plaintiffs-Appellees, to survive summary disposition on a claim of ostensible agency, must have presented evidence that "she was harmed as a result of relying on the perceived fact

that the [Local Aerie] was an agent of [the Grand Aerie]." See Little, 183 Mich. App. at 683. In other words, Plaintiffs-Appellees must show that they "justifiably expected" the septic riser to be secure because she believed that the Grand Aerie, rather than the Local Aerie, operated the chapter. Id. Because Plaintiffs-Appellees submitted no such evidence, their ostensible agency assertion must fail.

Plaintiffs-Appellees also fail to prove the second element of ostensible agency because there is no evidence that any **act or neglect** of the Grand Aerie caused them to reasonably believe that an agency relationship was in existence in relation to repairs of the septic tank or "Family Fun Day." It is undisputed that the Grand Aerie had no knowledge of the existence of either of these activities until this suit was filed. Accordingly, because Plaintiffs-Appellees cannot prove two required elements, summary disposition or judgment not withstanding the verdict should have been granted on the ostensible agency claims.

3. Plaintiff has not produced sufficient evidence to indicate an implied agency relationship between the Grand Aerie and the Local Aerie.

Implied agency must "rest upon acts and conduct of the alleged agent known to and acquiesced in by the alleged principal prior to the incident at bar." Shinabarger v. Phillips, 370 Mich. 135, 139; 121 N.W.2d 693 (1963). It must not exist contrary to the express intent of the party alleged as a principal. Weller v. Speet, 275 Mich. 655; 267 N.W. 758 (1936). "An agent has implied authority from his principal to do business in the principal's behalf in accordance with the general custom, usage and procedures in that business." Maretta, 195 Mich. App. at 698. "[T]he principal must have notice that the customs, usage and procedures exist." Id.

The Grand Aerie did not expressly intend the Local Aerie to serve as its agent. Rather, the evidence contained in the Constitution, Statutes, and the course of dealing between the Grand

Aerie and the Local Aerie indicate an express intent on the part of the Grand Aerie to preclude an agency relationship between the entities. The Constitution provides that

> The Grand Aerie shall not be financially or otherwise responsible for any acts or omissions on the part of the State, Provincial or Local Aerie or Ladies Auxiliary, nor shall any State, Provincial, or Local Aerie or Ladies Auxiliary have any right or power to act on behalf of the Grand Aerie or to in any manner obligate the Grand Aerie. (Exhibit H, Article VIII, Sec. 1)

The "business" practices of the Grand Aerie do not indicate an intent to permit the Local Aerie to act as its agent. As discussed above, there is no evidence that the acts of the Grand Aerie manifested an intent to create an agency because the Grand Aerie simply has never indicated that it intended to control the day to day activities, such as maintenance, or the social gatherings of the Local Aerie.

b. The Grand Aerie cannot be held directly liable for failure to supervise the maintenance and social events of the Local Aerie because Michigan, and a majority of other jurisdictions, refuse to create a duty on the part of a national fraternal organization to supervise its local chapters.

A national fraternal organization cannot be held liable for negligent supervision of the maintenance of a local chapter because there exists no duty on the part of the national organization to do so nor was the duty undertaken by the national organization. To recover on a theory of negligent supervision, a plaintiff must prove that a national fraternal organization had a duty to conform to a particular standard of conduct in order to protect a plaintiff from unreasonable risks of harm. Colangelo v. Tau Kappa Epsilon Fraternity, 205 Mich. App. 129, 132; 517 N.W.2d 289 (1994).

In Colangelo, the Court of Appeals examined the duty of a national fraternity to supervise the conduct of its local chapters in regard to underage drinking. Finding that the national fraternity had no such duty, the Colangelo Court examined the forseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral

blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing the duty. Id. at 133.[4] Notably, the Court held that there was no duty on the part of the national organization to forsee the sequence of events that led from a party at the local chapter to the injury of a pedestrian. Id. at 133-134. Also, the Court noted that "the failure of a national organization's central staff to supervise parties will not necessarily have such tragic results." Id. at 134.

Like the national fraternity in Colangelo, the Grand Aerie should not be charged with a duty to supervise the maintenance and social functions of its local chapters. If a national fraternity does not have the duty to forsee injuries from parties at the local chapters, then the Grand Aerie certainly cannot forsee the death of a young child at a social gathering of which they had no notice and as a result of routine maintenance to the septic system undertaken by the Local Aerie.

There also is no evidence that the Grand Aerie assumed a duty to supervise the maintenance or social gatherings of the Local Aerie. Nothing in the Grand Aerie's bylaws reserved to the national organization the duty to control maintenance work at the local chapters. Instead, the Grand Aerie's Constitution and Statutes specifically granted the Local Aeries autonomy in conducting day to day activities. (Exhibit H) Realizing the tenuous nature of their assertion of negligent supervision, Plaintiffs-Appellees have apparently abandoned their argument under this theory of liability. See Plaintiffs-Appellee's Response in Opposition to Defendant's Application for Leave to Appeal, pp. 19-27.

[4] Similarly, as the Grand Aerie notes on page 33 of its Application for leave to appeal, a plethora of cases from other jurisdictions have refused to find that a national fraternal organization had a duty to supervise the activities of local chapters.

c. The Grand Aerie cannot be held liable under a theory of premises liability because it neither possessed nor controlled the land on which Plaintiffs-Appellants' decedent was injured.

Plaintiffs-Appellees' attempt to invoke premises liability against Grand Aerie has absolutely no foundation in Michigan case law. "Premises liability is conditioned on the presence of both possession and control over the land." Merritt v. Nickelson, 407 Mich. 544, 552; 287 N.W.2d 178 (1980). "[P]ossession for purposes of premises liability does not turn on a theoretical or impending right of possession, but instead depends on the actual exercise of dominion and control over the property." Kubczak v. Chemical Bank & Trust Co., 456 Mich. 653, 661; 575 N.W.2d 745 (1998). A national fraternal organization that maintains only a contingent interest in a local chapter's land is neither in possession nor control of that property. Kratze v. Order of Oddfellows, 190 Mich. App. 38, 44; 475 N.W.2d 405 (1991); aff'd in part, rev'd in part on other grounds, 442 Mich. 136 (1993). The Kratze Court determined that

> Lodge No. 11 purchased lots 2911 and 2912 in its corporate capacity and erected on these lots a structure for its use. Under an agreement between Lodge No. 11 and the Grand Lodge, Lodge No. 11 retains control, possession, and ownership of its real property until such time as it becomes defunct, breaches the organization's bylaws, or ceases to be a member in good standing. Should any of these eventualities occur, the Grand Lodge assumes possession and ownership of the property of its subordinate lodge and the property is put to other charitable uses. Clearly, the Grand Lodge has no present possessory right or any vested interest in property owned by Lodge No. 11. Id. at 44-45.

"[A]lthough a defendant may have the right to occupy and control land, liability will attach only where the right is actually exercised." Little, 183 Mich. App. at 679.

The case at hand presents similar circumstances to those of Kratze. Plaintiff has presented no proofs that the Grand Aerie was in possession and control of the premises of its local chapter. Rather, like the Lodge No. 11 in Kratze, the Local Aerie was the sole owner of the premises where the accident occurred. (Exhibit E) Moreover, the Grand Lodge has nothing more

than a contingent interest in the property. Only when a Local Aerie's Charter is surrendered or revoked does the Grand Aerie assume any present ownership interest. (Exhibit H, Sec. 39.6) In practice, the Grand Aerie will not revoke the charter of a Local Aerie that retains title to any property. (Exhibit E to Motion for Summary Disposition) Thus, the Grand Aerie does not own or possess the premises of the Local Aerie under Kratze.

The Grand Aerie also retains no control over the property of the Local Aerie. The Constitution of the Grand Aerie allows the Local Aerie to control all aspects of the property, including admission of persons onto it:

> Each Local Aerie shall be the sole judge of the persons who may be admitted as guests or members.
> Each Local Aerie, by its By-Laws and/or House Rules, can make such rules and regulations for the admission of guests to its club's facilities as the Local Aerie desires. (Exhibit H, Article VII, Sec. 8)

A Local Aerie may engage in any activity on its property that is not illegal or contrary to the rules of the Grand or State Aerie. (Exhibit F to Grand Aerie's Motion for Summary Disposition, pp. 22-23) As seen above, the Grand Aerie has no control over the day to day maintenance or the social schedule of the Local Aerie. Consequently, the undisputed facts indicate that the Grand Aerie cannot be charged with premises liability since it neither possesses nor controls the real property of the Local Aerie.

d. Policy strongly recommends that no vicarious or direct liability should be imposed on national fraternal organizations for the torts committed by their local chapters in the course of the latter's day to day business.

The Elks and Moose believe that sound public policy supports the position that this Court should abrogate the indirect and direct liability of a national fraternal organization for the torts of its local chapters. The policy implications of the finding of liability on the part of a national fraternal organization are well addressed by the Colangelo Court:

> Examination of the burdens and consequences of imposing a duty and the resulting liability for breach underscores the soundness of the trial court's decision not to impose a duty upon the national fraternity to supervise the daily activities of its local chapters. The effect of imposing such a duty would force the central staff of a national organization to maintain continuous contact with every local branch in order to determine what proposed daily activities might possibly harm third parties. An organization like the national fraternity, which has over three hundred local chapters, would require a large staff and complex organizational structure to accomplish this task, thereby greatly increasing the cost of operation. Notably, the purpose of organizations like the national fraternity would fundamentally change from an instructor of the principles, rituals, and traditions of the fraternity to a central planning and policing authority. The resulting liability for breach of such a duty might then be evenly assessed to all members of the organization by the purchase of insurance, with those local chapters most at risk being assessed higher premiums. We find this situation less equitable in comparison to the current system in which the local chapters and their local governing boards (like the housing corporation) take responsibility for their own actions. 205 Mich. App. at 135-136.

A decision to impose either indirect or direct liability against the Grand Aerie would compel all national fraternal organizations to essentially micromanage every one of their hundreds, or even thousands of local chapters. At the very least, armies of inspectors from the national organizations would need to be continuously dispatched to the local chapters in order to examine the progress of simple maintenance activities. The resulting inefficiency and burden on the national organizations would clearly endanger their existence, as they would face the prospect of catastrophic liability and the expense of employing scores of supervisors to keep a vigilant eye on the local chapters. The local chapters themselves would directly and indirectly feel this burden. They would clearly lose most of their autonomy amongst the requirements to report and obtain approval for almost every action and decision. Moreover, the dues to national organization would grow exponentially. In fact, the imposition of liability in cases like this may even cause local chapters to question the need to continue relationships with their national organizations.

Thus, the overwhelming weight of authority and public policy considerations strongly support the Elks and Moose positions that this Court should hold that a national fraternal organization is neither vicariously or directly liability for the torts of its local chapters.

II. THE COURT SHOULD OVERTURN THE VERDICT AGAINST THE GRAND AERIE BECAUSE IT WAS A DIRECT RESULT OF AN UNETHICAL AND IMPROPER MARY CARTER AGREEMENT BETWEEN PLAINTIFFS-APPELLEES AND THE LOCAL AERIE.

This case presents the Court with an excellent opportunity to clarify the impropriety of an abuse of the litigation process known as a Mary Carter Agreement. This tactic, and the failure of the Trial Court to at least allow Grand Aerie to inform the jury of the settlement between Plaintiffs-Appellees and the Local Aerie, severely prejudiced the Grand Aerie's defense of the suit.

The question of the existence of an improper Mary Carter agreement is one of law and, therefore, reviewed de novo. Rogers v. City of Detroit, 457 Mich. 125; 579 N.W.2d 840 (1998). The term "Mary Carter agreement" stems from a Florida decision: Booth v. Mary Carter Paint Co., 202 So.2d 8 (Fla. App. 1967). According to the Court of Appeals in Smith v. Childs, 198 Mich. App. 94, 97-98; 497 N.W.2d 538 (1993),

> [t]he distinguishing characteristics of a *Mary Carter* agreement are that it (1) not act as a release, so the agreeing defendant remains in the case, (2) is structured in a way that it caps the agreeing defendant's potential liability and gives that defendant an incentive to assist the plaintiff's case against the other defendants, and (3) is kept secret from the other parties and the trier of fact, causing all to misunderstand the agreeing defendant's motives.

"Mary Carter agreements deny a fair trial to those defendants who are not part of the agreement." Rogers, 457 Mich. at 149, fn 22.

The agreement entered into between the Local Aerie and Plaintiffs-Appellees fit into the definition of a Mary Carter agreement. First, the agreement did not act as a release as the Local

Aerie remained as a defendant and was represented by counsel at a trial. Second, the Local Aerie, in exchange for the cap on recovery, agreed to admit agency and control on the part of the Grand Aerie. Finally, due to the Trial Court's refusal to allow the Grand Aerie to present evidence of the agreement, it was kept secret from the jury.

Agreements of this sort have been condemned by courts across the country. As noted by Defendant-Appellant, the majority of jurisdictions that have examined Mary Carter agreements have either declared such agreements illegal or provided that the jury should be informed of the circumstances.[5] Moreover, the American Bar Association has declared that professional ethics demands that the terms of the agreement be disclosed to the jury. Informal Opinion of the American Bar Association, 1386 (1977)(Exhibit S). "If an attorney has entered into an agreement of this nature, the concealment of it or the failure to reveal it could be misleading and deceptive to opposing counsel, the court and the ***jury***." Id. (emphasis added)

Developments in Michigan statutory law also require this Court to revisit the appropriateness of Mary Carter agreements. As in this case, these agreements have been recently employed to defeat the Non-Party at Fault provisions of the Michigan Code and Court Rules in joint and several liability cases. MCL 600.2957, MCL 600.6304, and MCR 2.112(K). There is no question that the Legislature could not have intended these rules to be circumvented in such a manner.

The jury should at least be informed that a plaintiff and one of the defendants have essentially settled the case, yet that defendant remains in the courtroom with a potential interest in assisting the plaintiff in proving liability and damages. Such a disclosure is certainly relevant

[5] Dosdourian v. Carsten, 624 So.2d 241 (Fla. 1993); L.J. Vontz Constr. Co. v. Alliance Indus., 215 Neb. 268, 338 N.W.2d 60 (1983); Firestone Tire & Rubber Co. v. Little, 276 Ark. 511, 639 S.W.2d 726 (1982); G.M. Corp. v. LaHocki, 286 Md. 714, 410 A.2d 1039 (1980); Cox v. Kelsey-Hayes Co., 594 P.2d 354 (Okla. 1979); G.M. Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977); Degen v. Bayman, 86 S.D. 598, 200 N.W.2d 134 (1972); Lum v. Stinnet, 488 P.2d 347 (Nev. 1971); Trampe v. Wisconsin Telephone Co., 252 N.W. 675 (Wis. 1934).

in the consideration of potential bias of witnesses affiliated with the Mary Carter defendant. Plaintiffs-Appellees can make no showing of how the information would be unfairly prejudicial. Moreover, in many cases of joint and several liability, the jury may be hoodwinked into believing that any verdict awarded would be paid by the most "guilty" party.

In this matter, the Local Aerie made no attempt to defend the case at trial. It is likely that the jury, observing this inaction, believed that the Local Aerie was essentially admitting egregious behavior. Not knowing that the whole verdict would be paid by the party least at fault (if at all), the Grand Aerie, the jury awarded a large verdict in their anger directed toward the Local Aerie's perceived callousness. The jury should have had all of the relevant information before it. The Trial Court's refusal to disclose the Mary Carter agreement prevented this. Consequently, because Mary Carter agreements are contrary to public policy of a fair trial and are simply unethical, this Court should declare such agreements illegal or mandate that they are at least disclosed to the trier of fact.

CONCLUSION

A hearing of this matter in the Michigan Supreme Court will allow this Court to address several areas of law that are unsettled in this state and correct a multitude of errors committed by the Trial Court and confirmed by the Court of Appeals. This Court should issue a forceful declaration that a national fraternal organization is not vicariously or directly liable for the torts of its local chapters when no control over daily operations was maintained. Additionally, this Court should roundly condemn the devious and unethical Mary Carter agreement as void and against public policy.

RELIEF REQUESTED

Amicus Curiae Benevolent and Protective Order of Elks and Moose International, Inc., pray that this Court grant Defendant-Appellant Grand Aerie's Application for Leave to Appeal and summarily overturn the Court of Appeals or alternatively, grant leave and allow oral arguments.

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